

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA)	
)	
v.)	
)	Docket no. 00-CR-50-B-S
ADAM DEAN,)	
)	
Defendant)	

ORDER DENYING MOTION TO STRIKE

SINGAL, District Judge

Before the Court is Defendant Adam Dean's Motion to Strike a Portion of the Indictment against him (Docket #17). For the reasons discussed below, the Court DENIES Defendant's Motion.

I. BACKGROUND

On July 11, 2000, Defendant was indicted for possessing images of child pornography and for transporting child pornography across state lines via the Internet, in violation of 18 U.S.C. §§ 2252A(a)(1) and 2252A(a)(5)(B). See Indictment (Docket #1).) These two crimes normally carry sentences of not more than five years and not more than fifteen years, respectively. See 18 U.S.C. §§ 2252A(b)(1), 2252A(b)(2).

On the heels of the first indictment followed a superseding indictment, which invoked enhanced penalty provisions for repeat sex offenders (Docket #6). The Government then filed the Second Superseding Indictment (Docket #17), which added a third count: receiving child pornography through interstate commerce, via the Internet. The Second Superseding Indictment states that Defendant was

convicted of a crime relating to sexual abuse and abusive sexual conduct involving a minor or ward, namely:

Unlawful Sexual Contact (Class C), in the Maine Superior Court for Portland, Cumberland County, Maine, docket number CR-84-1319, on or about April 8, 1985;

(Second Superseding Indictment (Docket #13).) Criminal defendants convicted of possessing, receiving or transporting child pornography subsequent to a state conviction “relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward,” face minimum sentences of two or five years, respectively, and maximum sentences of ten or thirty years, respectively. See 18 U.S.C. §§ 2252A(b)(1), 2252A(b)(2).

Defendant challenges the application of these enhanced sentencing provisions by arguing that the state conviction of unlawful sexual contact does not fall within the meaning of the federal statute. On this basis, Defendant requests that the Court strike from the pending indictment any reference to the past State court conviction.

II. DISCUSSION

Title 18, Section 2252A imposes harsher penalties on a person who possesses, receives or transports child pornography “if such person has a prior conviction under this chapter, chapter 109A, or chapter 117, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward....” 18 U.S.C. §§ 2252A(b)(1), 2252A(b)(2). The indictment states that Defendant was convicted of “Unlawful Sexual Contact (Class C),” which the parties agree refers to subsection 1, paragraph C of Maine’s unlawful sexual contact statute, which stated in April 1985 that

1. A person is guilty of unlawful sexual contact if he intentionally subjects another person, not his spouse, to any sexual contact, and

...

C. The other person has not in fact attained his 14th birthday and the actor is at least 3 years older;

17-A M.R.S.A. § 255(1)(C) (West 1983).¹ Therefore, the question is whether the Maine crime of unlawful sexual contact with a person under the age of fourteen was a law relating to abusive sexual conduct involving a minor or ward.²

A. United States v. Roy

Defendant relies on United States v. Roy, 114 F. Supp. 2d 1 (D. Me. 2000), in which the Court struck the portion of an indictment seeking an enhanced penalty for possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5). See id. at 1-2. In Roy, the defendant previously had been convicted in Maine state court under 17-A M.R.S.A. § 255(1)(A) for unlawful sexual contact involving a fourteen-year old girl. See id. Therefore, the Government included in the federal indictment the imposition of the heightened penalty under 18 U.S.C. § 2252A(b)(2). See id.

The prior conviction, however, had been made pursuant to a specific subsection of the unlawful sexual contact statute which makes it a crime to intentionally subject someone to a sexual contact without that person's express or implied acquiescence. See 17-A M.R.S.A. § 255(1)(A). Thus, the defendant in Roy had been convicted because the victim had not acquiesced to participate in the sexual contact, not because of her young

¹ Both parties agree that Defendant was convicted pursuant to 17-A M.R.S.A. § 255(1)(C) on April 8, 1985, and both parties have submitted evidence of the prior criminal conviction. Later that year, on September 19, 1985, several amendments to the unlawful sexual contact statute took effect.

² The Government does not argue that 17-A M.R.S.A. § 255(1)(C) relates to sexual abuse or aggravated sexual abuse.

age. See Roy, 114 F. Supp 2d at 3. The Court reasoned that the enhanced sentencing provision of 18 U.S.C. § 2252A(b)(2) depends on whether the relevant statute, not the conviction itself, relates to sexual abuse or sexual conduct involving a minor or ward. See id. Because 17-A M.R.S.A. § 255(1)(A) has nothing to do with the age of the victim, the Court ruled that the increased penalties of 18 U.S.C. § 2252A(b)(2) could not apply. See id.

Roy is easily distinguishable from the present case because it is undisputed that Defendant previously was convicted pursuant to 17-A M.R.S.A. § 255(1)(C), which explicitly outlaws sexual contact between an adult and a child under the age of fourteen. In the within case, the age of the victim was an essential element of the law supporting Defendant's prior conviction. Therefore, Roy is inapposite, and Defendant's prior conviction could fall within the meaning of 18 U.S.C. §§ 2252A(b)(1) and 2252A(b)(2).

B. Whether Abusive Sexual Conduct Includes Unlawful Sexual Contact

Extending the logic of the Court's holding in Roy, Defendant argues that his prior conviction was for "unlawful sexual contact," which is distinct from any sort of law relating to "abusive sexual conduct." Defendant argues that this Court should apply a strict reading to 18 U.S.C. §§ 2252A(b)(1) and 2252A(b)(2), even though both paragraphs utilize the broad language "the laws of any State *relating to* ... abusive sexual conduct...." 18 U.S.C. §§ 2252A(b)(1), 2252A(b)(2) (emphasis added). The federal statute does not explicitly define abusive sexual conduct, but it does offers some guidance on the meaning of the phrase.

Chapter 109A of Title 18 establishes two levels of federal sex crimes: crimes of “sexual abuse” which involve “sexual acts,” and crimes of “abusive sexual contact” which involve “sexual contacts.” See 18 U.S.C. §§ 2241—47. Section 2244, entitled “Abusive sexual contact,” criminalizes “[s]exual *conduct* in circumstances where sexual acts are punished by this chapter.” 18 U.S.C. § 2244(a) (emphasis added). All of the crimes defined in section 2244(a) involve sexual contacts, and therefore section 2244(a) suggests that “abusive sexual conduct” and “abusive sexual contact” are synonymous. Indeed, federal courts often use the terms interchangeably. See, e.g., United States v. Urrabazo, 234 F.3d 904, 905 (5th Cir. 2000); United States v. Bahe, 201 F.3d 1124, 1126 (9th Cir. 2000); United States v. Downer, 143 F.3d 819, 820 (4th Cir. 1998); United States v. Foster, 30 F.3d 65, 66 (7th Cir. 1994); United States v. Lauck, 905 F.2d 15, 16 (2nd Cir. 1990). Therefore, the federal crime of abusive sexual contact informs the Court’s analysis of what qualifies as a law relating to abusive sexual conduct.

In fact, Defendant’s prior conviction, labeled “unlawful sexual contact,” closely resembles the federal crime of “abusive sexual contact.” A sexual contact under the federal law “means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person....” 18 U.S.C. § 2246(3). Engaging in a sexual contact with someone under the age of sixteen constitutes an abusive sexual contact under 18 U.S.C. § 2244(a)(3).

When Defendant was convicted and sentenced in April 1985, the Maine statute defined sexual contact as “any touching of the genitals, directly or through clothing, other than as would constitute a sexual act, for the purpose of arousing or gratifying sexual

desire.” 17-A M.R.S.A. § 251(1)(D) (West 1983). As discussed above, engaging in a sexual contact with a child under the age of fourteen constituted an unlawful sexual contact pursuant to 17-A M.R.S.A. § 255(1)(C).

Thus, Maine’s definition of sexual contact was substantially similar to the federal definition. In fact, the federal definition is somewhat broader than the state formulation. Thus, Defendant’s convicted conduct falls within the ambit of abusive sexual contact as defined in 18 U.S.C. § 2244(a)(3). Moreover, the Court finds that a federal conviction for abusive sexual contact with a minor implicitly involves abusive sexual conduct. Therefore, 17-A M.R.S.A. § 255(1)(C) was a law relating to abusive sexual conduct, and Defendant’s prior conviction triggers the penalty increase of 18 U.S.C. §§ 2252A(b)(1) and 2252A(b)(2).

III. CONCLUSION

For the foregoing reasons, the Court DENIES Defendant’s Motion to Strike a Portion of the Indictment.

SO ORDERED.

GEORGE Z. SINGAL
United States District Judge

Dated this ____ day of February, 2001.

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